



Supreme Court of the United States

OCTOBER TERM, 1944.

No. _____

WILLIAM CAMMICK WAGONER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit has not as yet been officially reported but appears at Page 44 of the Record herein.

Jurisdiction.

1. The date of the judgment to be reviewed is July 5, 1944.
2. The Statutory provisions which is believed to sustain the jurisdiction is that the Circuit Court of Appeals for the Seventh Circuit has decided a Federal Question of Law in a way probably in conflict with applicable decisions of this Court and has decided an important question

of Federal Law which has not been, but should be settled by this Court.

3. That the Circuit Court of Appeals for the Seventh Circuit has decided that an indictment charging an accused with knowingly and wilfully failing to present himself for registration and to register pursuant to the Selective Service and Training Act of 1940 as amended (50 U. S. C. A. Sect. 301) need not allege that the accused is a male citizen or resident of the United States and is between the ages of eighteen and sixty-five years of age and that if these facts appeared in the evidence they served to cure the omission thereof in the indictment, contrary to settled principles of law.

4. The cases believed to sustain said jurisdiction are:

Ruthenberg v. United States, 245 U. S. 480; 62 L. Ed. 414.

United States v. Cook, 17 Wall 168; 21 L. Ed. 538.

United States v. Hess, 124 U. S. 483.

Edwards v. United States, (C. C. A. 4th) 266 Fed. 848.

Statement of the Case.

This has already been stated in the preceding petition at Page 1 thereof and is hereby adopted and made part of this brief.

Specification of Error.

1. The Circuit Court of Appeals for the Seventh Circuit erred in holding that an indictment charging petitioner with knowingly and wilfully failing to present himself for registration and to register as required by the Selective Service and Training Act of 1940 and as amended

(50 U. S. C. A. 301) was sufficient to charge an offense under said act and that it was not necessary to allege that petitioner was a male citizen or resident of the United States and was between the ages of eighteen and sixty-five years of age as provided in Section 302 of said Act.

2. The Circuit Court of Appeals for the Seventh Circuit erred in holding an indictment failing to allege the ingredients of a statutory offense may be cured by the evidence, if the material omissions from the indictment appear in the evidence.

ARGUMENT.

Summary of Argument.

Point A. An indictment charging an offense under the Selective Service and Training Act of 1940 as amended must bring the accused within the purview of the Act and show he is subject to the provisions thereof by proper allegation, otherwise the indictment is invalid and may be attacked for the first time on appeal.

Point B. An indictment that is fatally defective may not be cured by evidence so as to supply to the indictment omitted essentials necessary to constitute the offense alleged.

Point A.

Omitting formal parts of the indictment the same reads (R. 1):

“William Cammick Wagoner, late of said District at and in the County of Grant, State of Indiana and within the Fort Wayne Division of the Northern District of Indiana, and within the jurisdiction of this Court, on or about the 16th day of February 1942, did then and there unlawfully, knowingly, wilfully and feloniously evade registration as required by the Selective Service and Training Act of 1940, as amended, by then and there unlawfully, knowingly, wilfully and feloniously failing and refusing to present himself for and submit to registration at such time and place and in such manner as determined by the rules and regulations prescribed under said Act, as amended.”

The indictment is founded on the failure of the petitioner to comply with provisions of the Selective Service

and Training Act of 1940, as amended and Section 302 (50 U. S. C. A.) of the Act provides:

“Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States and every other male resident of the United States who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five years to present themselves for and to submit to registration at such time or times and place or places, and in such manner and in such age group or groups as shall be determined by rules and regulations hereunder.”

Section 311 of the same Act, in part provides:

“Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * or who otherwise evades registration * * * or any of the requirements of this Act * * * shall upon conviction, etc.”

It is clear from Section 302 above that only male citizens or residents of the United States between the ages of eighteen and sixty-five years of age are bound to comply with the provisions thereof.

Section 311 of the Act ordains that “any Person charged as herein provided * * * who shall knowingly fail or neglect to perform such duty * * * or who otherwise evades registration * * * shall upon conviction be punished”. The “person” mentioned in this Section of necessity is the “person” mentioned in Section 302, that is a male resident or citizen of the United States between the age group defined therein.

To charge an offense under the Act it is first necessary to show that the “person” alleged to have violated the Act is a “person” defined within the Act and in this case a male citizen or resident of the given ages. The indictment under question does not allege that petitioner is a

male person or resident of the United States nor does it allege that he is between the ages of eighteen and sixty-five years. The indictment is barren of any allegation or statement from which it may be inferred that the petitioner is in any wise subject to the Act or in any way bound to comply with its provisions.

Every male citizen or resident of the United States is not obligated to present himself for registration or to be registered. The Act does not apply to females, and there is nothing in the indictment to identify the sex of the petitioner unless the name William is sufficient for that purpose. The indictment does not allege the age of the defendant, and nothing appears therein that would furnish as much as a hint or suspicion thereof. The indictment wholly fails to bring petitioner within the operation of the Act that he is charged with violating and is therefore fatally defective, (*United States v. Cook*, 17 Wall 168; 21 L. Ed. 538) and the defect may be raised for the first time on appeal (*Edwards v. United States*, 266 Fed. 848). That the accused is a male citizen or resident of the United States and between the ages of eighteen and sixty-five years are necessary allegations in an indictment charging an offense under the Act and are matters of substance and not form is recognized by this Court in *Ruthenberg v. United States*, 245 U. S. 480, 483; 62 L. Ed. 414, 418:

“Further it is said the indictment was insufficient because it did not allege that Schue who, it was charged, refused to register, was a citizen of the United States, or was a person not an alien who had declared his intention to become such a citizen. But this overlooks the fact that although only the persons described were subject to military duty under the terms of the Act, by Section 5 ‘all male persons between the ages of twenty-one and thirty both inclusive * * * were required to register. It was sufficient to charge therefore, as the indictment did, that Schue was a male person between the designated ages.’”

Point B.

An indictment that is fatally defective may not be cured by evidence so as to supply to the indictment omitted essentials necessary to constitute the offense alleged.

In 27 Am. Jur. Sect. 191, Page 736 the rule is expressed:

“It is well settled that a verdict will not cure a failure to allege a criminal offense or the omission of any essential allegation; any such objection is fatal after as well as before verdict.”

In *United States v. Hess*, 124 U. S. 483, 485 it was held:

“It must be held that the second count of the indictment before us does not sufficiently describe an offense within the statute. The essential requirement, indeed all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form and their omission is not aided or cured by the verdict.”

And to the same effect is the case of *Edwards v. United States*, 266 Fed. 848, 850:

“This would seem eminently proper, because if it appears that no crime was charged in the indictment it must follow that the verdict of guilty is no broader than the charge, and does not import any crime whatever, and consequently there is nothing to support the judgment.”

Conclusion.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and proceedings in the case Numbered 8510 and entitled on its docket, The

United States of America, plaintiff-appellee *vs.* William Cammick Wagoner, defendants-appellant, and that the said judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed and for such other and further relief as to this Court may seem meet and proper.

WILLIAM CAMMICK WAGONER,

By JOHN D. SHOAF,

Counsel for Petitioner,

Old First Bank Bldg.,

Fort Wayne, Indiana.

R. C. PARRISH,

ROBERT J. PARRISH,

Standard Bldg.,

Fort Wayne, Indiana,

Of Counsel.

